Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1214

H. THOMAS FOLEY AND
MARY V. FOLEY,

Petitioners,

v.

COMPTROLLER OF THE TREASURY,
STATE OF MARYLAND,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

H. THOMAS FOLEY AND
MARY V. FOLEY
Pro se

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IN THE

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OCTOBER TERM, 1970

No.

H. THOMAS FOLEY AND
MARY V. FOLEY,

Petitioners,

v.

COMPTROLLER OF THE TREASURY,
STATE OF MARYLAND,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland, entered in the above entitled case on October 20, 1970.

A. OPINIONS BELOW

All opinions of the Courts of Maryland are set forth in Appendices A and C.

B. THE GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Jurisdiction in this Court is invoked under Title 28, U.S. Code 1257 (3) and Rule 19, Subdivision 1 of the rules of this Court.

C. QUESTION PRESENTED FOR REVIEW

Does the progressive nature of the Maryland income tax violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States?

D. CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Constitutional provision involved herein is that portion of Amendment XIV relating to equal protection of the law (Appendix D).

The Statute involved is the Annotated Code of Maryland (1969 Repl. Vol.): Article 81, Section 288(a) which imposes a progressive rate of tax on the net annual income of individuals. (Appendix E)

E. STATEMENT OF THE CASE AND MATERIAL FACTS

The appellants, on August 9, 1968, submitted an amended income tax return for the tax year 1967 claiming a partial refund of taxes paid on the incomes of the appellants. The amount claimed is Four Hundred Thirty-Nine Dollars ($439.00). The basis of the claim was then and is now as follows:

Article 2 of the Constitution of the State of Maryland states: "The Constitution of the United States and the Laws made, or which shall be made in pursuance thereof, and all Treaties made, or which shall be made under the authority of the United States, are and shall be the Supreme Law of the State; and the judges of this state, and all the people of this state, are, and shall be bound thereby; anything in the Constitution or Law of this State to the contrary nothwithstanding."

Amendment XIV, Section 1, of the Constitution of the United States says that no state may "deny any person within its jurisdiction the equal protection of the law."

We claim that a tax of Five Hundred Ten Dollars ($510.00) on the taxable income of H. Thomas Foley represents a rate of about 5% and that a tax of Three Hundred Seven Dollars ($307.00) on the taxable income of Mary V. Foley represents a rate of about 4.7%.

We claim, therefore, that this represents denial of equal protection of the law in that the rate for persons with the lowest taxable income is lower, i.e., 2%.

Therefore, we claim that all monies over and above 2% of the taxable income are collected unconstitutionally.

To sum up: one man; one vote; one tax rate.

On October 16, 1968, the Comptroller of the Treasury through the office of Benjamin F. Marsh, Income Tax Division, denied the claim.

On October 28, 1968, a Petition of Appeal was filed with the Maryland Tax Court in Baltimore. (Income Tax No. 156).

On July 23, 1969, a hearing was held on the appeal.

On August 8, 1969, an Order of Court in the Maryland Tax Court affirmed the action of the Comptroller denying the petitioners' claim for a refund.

On September 2, 1969, an Order for Appeal and Petition for Review of this adverse decision was filed with the Circuit Court for Prince George's County, Maryland.

On November 19, 1969, this case (Law No. 41,585) was heard before Judge Roscoe H. Parker, who affirmed the opinion of the Maryland Tax Court.

On May 27, 1970, an appeal was filed with the Court of Appeals of Maryland in Annapolis, Maryland. (Appendix A)

On September 16, 1970, this appeal (No. 30) was heard by the Court of Appeals of Maryland.

On October 20, 1970, that court affirmed the judgment of the Circuit Court for Prince George's County. (Appendix C)

F. ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

IT IS A DENIAL OF EQUAL PROTECTION OF THE LAW FOR THE STATE OF MARYLAND TO TAX THE NET ANNUAL INCOMES OF THE PETITIONERS AT A HIGHER RATE THAN THAT OF OTHER CITIZENS OF THE STATE OF MARYLAND.

In recent years this Court has expanded the application of the Equal Protection Clause, most notably in regard to apportionment of state legislatures (*Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L. Ed. 2d 663 (196), *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L. Ed. 2d 506 (1964)). Indeed, this Court has unequivocally stated that it intends to scrutinize closely those classifications which might invade or restrain fundamental rights and liberties asserted under the Equal Protection Clause (*Harper v. Virginia State Board of Education*, 383 U.S. 663, 86 S.Ct. 1079 (1966). In this same case, the Court also proclaimed that,

> "Equal Protection Clause is not shackled to political theory of particular era and court in determining what lines are discriminatory is not confined to historic notions of equality, any more than due process is restricted to fixed catalogue of what was at given

time deemed to be limits of fundamental rights; notions of what constitutes equal treatment for purposes of Equal Protection Clause do change." *Harper v. Virginia State Board of Education*, 86 S. Ct. 1079 (1966)

In its opinion affirming the validity of the progressive rate of taxation of personal income, the Court of Appeals of Maryland cites no case later than 1940; nor does that Court cite any case involving a graduated state income tax. *Knowlton v. Moore*, 178 U.S. 41, 20 S.Ct. 747 is from 1900 and involves a progressive *federal* tax. The XIV Amendment was not in question. *Breshaber v. Union P.R. Co.*, 240 U.S. 1, 36 S.Ct. 236, from 1916, involves *federal* tax and turned on due process.

The most recent case cited that reached this Court is *Welch v. Henry*, 305 U.S. 134, 59 S.Ct. 121 (1938), which involved graduated taxation on corporate dividends. Justice Stone is quoted as follows: " . . . . Possible differences in tax burdens, not shown to be substantial, or which are based on discrimination not shown to be arbitrary or capricious, do not fall within the constitutional prohibition" of the XIV Amendment. The definition of the limitations of what is meant by "substantial" or by "discrimination which is not shown to be arbitrary or capricious" is not stated. In practice, these definitions seem to be determined on a case by case basis. (16 A C.J.S. 318) In both *Blaustein v. Tax Comm*, 176 Md. 423, 428, 4 A.2d 861 (1939), and *Royster Guano Co. v. Virginia*, 253 U.S. 412, 40 S.Ct. 560 (1970), cited by the Court of Appeals as authority allowing states to make reasonable classification (discrimination), the cases were remanded because the classifications in question were illusory. This Court has held on other occasions that in passing on the constitutionality of state tax, it is concerned only with its operation, not its definition or precise form of descriptive words which may be applied to it. (46 F Pr Dig 594, referring to *City of Detroit v. Murray Corp. of America*, 355 U.S. 489, 78 S.Ct. 458 (1958).

State of Wisconsin v. J. C. Penny Co., 311 U.S. 435, 61 S. Ct. 246 (1941), and *U.S. v. Dept. of Revenue of State of Illinois*, 191 F. Supp. 723 (1961).)

Although this Court has made no rulings as regards a graduated state income tax, it has declared unconstitutional a graduated gross sales tax on merchants on the basis of denial of equal protection. (*Stewart Dry Good Co. v. Lewis*, 294 U.S. 550, 55 S.Ct. 525, 79 L.Ed. 1054 (1935).) This finding was affirmed in *Valentine v. Great Atlantic and Pacific Tea Co.*, 299 U.S. 32, 57 S.Ct. 56, 81 L.Ed. 22 (1936).

In its opinion, the Court of Appeals of Maryland avoids the question of whether or not there is equal protection of the citizens of Maryland as to the rate of taxation of annual net income. Instead, it relied upon "reasonable classification" as its basis for sustaining the constitutionality of Maryland's graduated income tax. The question of reasonableness or unreasonableness is irrelevant. The mere fact that the State discriminates among its citizens with respect to rate of taxation of annual net income is *per se* unconstitutional under XIV Amendment. This Court itself has said as much in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) when it declared "where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them." This principle should be applicable to all matters involving a citizen and his State.

Because of the importance of the constitutional questions raised herein and because of the recent dynamic applications of XIV Amendment, petitioners urge the court to assume jurisdiction over this matter.

CONCLUSION

The Writ of Certiorari herein prayed for should be granted.

Respectfully submitted,

H. Thomas Foley and
Mary V. Foley
Pro se

APPENDIX A
IN THE

COURT OF APPEALS OF MARYLAND

SEPTEMBER TERM, 1970

No. 30

H. THOMAS FOLEY AND
MARY V. FOLEY

Appellants.

v.

COMPTROLLER OF THE TREASURY

Appellee.

APPEAL FROM THE CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY
(Roscoe H. Parker, Judge)

APPELLANT'S BRIEF

STATEMENT OF THE CASE

This is an appeal from the opinion of Judge Roscoe H. Parker of the Circuit Court for Prince George's County dated November 19, 1969, which affirmed the August 8, 1969 Order of the Maryland Tax Court, said order affirming the Comptroller's denial of the appellants' claim for refund of income tax for the tax year 1967.

QUESTION PRESENTED

1. Is the Fourteenth Amendment of the Constitution of the United States applicable to the 1967 Maryland income tax law?

STATEMENT OF FACTS

The appellants, on August 9, 1968, submitted an amended income tax return for the tax year 1967 claiming a partial refund of taxes paid on the incomes of the appellants. The amount claimed is Four Hundred Thirty-Nine Dollars ($439.00). The basis of the claim was then and is now as follows:

Article 2 of the Constitution of the State of Maryland states: "The Constitution of the United States and the Laws made, or which shall be made in pursuance thereof, and all Treaties made, or which shall be made under the authority of the United States, are and shall be the Supreme Law of the State; and the judges of this state, and all the people of this state, are, and shall be bound thereby; anything in the Constitution or Law of this State to the contrary not withstanding."

Amendment XIV, Section 1, of the Constitution of the United States says that no state may "deny any person within its jurisdiction the equal protection of the law."

We claim that a tax of Five Hundred Ten Dollars ($510.00) on the taxable income of H. Thomas Foley represents a rate of about 5% and that a tax of Three Hundred Seven Dollars ($307.00) on the taxable income of Mary V. Foley represents a rate of about 4.7%.

We claim, therefore, that this represents denial of equal protection of the law in that the rate for persons with the lowest taxable income is lower, i.e., 2%.

Therefore, we claim that all monies over and above 2% of the taxable income are collected unconstitutionally.

To sum up: one man; one vote; one tax rate.

On October 16, 1968, the Comptroller of the Treasury through the office of Benjamin F. Marsh, Income Tax Division, denied the claim.

On October 28, 1968, a Petition of Appeal was filed with the Maryland Tax Court in Baltimore. (Income Tax No. 156).

On July 23, 1969, a hearing was held on the appeal.

On August 8, 1969, an Order of Court in the Maryland Tax Court affirmed the action of the Comptroller denying the petitioners' claim for a refund.

On September 2, 1969, an Order for Appeal and Petition for Review of this adverse decision was filed with the Circuit Court for Prince George's County, Maryland.

On November 19, 1969, this case (Law No. 41,585) was heard before Judge Roscoe H. Parker, who affirmed the opinion of the Maryland Tax Court.

ARGUMENT

THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES IS APPLICABLE TO THE 1967 MARYLAND INCOME TAX LAW

The 1967 Maryland income tax law (Article 81, Section 279 ff as amended) has established a graduation of rates such that the tax may vary from 2% to almost 5% of the annual taxable income. This variation in tax rate in of itself represents an inequality in that each taxpayer is not taxed in similar manner. This, the appellants hold, represents unequal protection of law and is therefore in violation of the Fourteenth Amendment to the Constitution of the United States. This is, in essence, the argument that the appellants set forth in their initial hearing before the Maryland Tax Court.

In affirming the decision of the Comptroller, that Court wrote a Memorandum of Grounds for Decision, the full text of which is as follows:

"The petitioner presented no evidence in support of his claim for a refund based on an amended return filed by himself and his wife in 1968 for the tax year 1967. He cited no cases to support his contention that the Constitution of Maryland, as well as the Fourteenth Amendment to the Federal Constitution, guaranteeing equal rights to all citizens, has been violated by the application of a greater tax rate in his case than that which is applied to persons with lower incomes. The main thrust of his argument was based on a one man, one vote analogy, for which he likewise cited no authority to show its applicability here. A number of cases have been decided confirming the right of the State, through its legislative arm, ti make reasonable classifications with regard to the incidence of the income tax. The validity of the graduated income tax scale has been judicially determined many times and has been upheld both on the Federal and State levels.

"Art. 81, § 6 classifies income taxes with other excise taxes. In the case of *Oursler v. Tawes*, 178 Md. 471 (1940) the Court of Appeals said: 'Taxes laid with a political view are not 'property taxes' but are such taxes as the legislature may levy, not upon property but upon occupations, privileges, contracts and things of that nature, *and as to those the rule of equality is not* applicable'. (Emphasis supplied). This case also held that the Federal Constitution, with respect to equal protection, did not prevent States from adjusting their systems of taxation in all proper and reasonable ways, provided all persons in like circumstances who are affected in the manner are treated under the law in the same way. The case specifically held the Maryland income tax law to be constitutional; see also *Diefendorf v. Gallet*, 10 P. (2d) 307 (Idaho, 1932).

"In light of the above cited cases and the lack of affirmative evidence from the taxpayer, this Court denies the claim for a refund; (Art. 81, § 229(h))."

In the Petition for Review in the Circuit Court for Prince George's County, the appellants addressed this memorandum as follows:

> "In its Memorandum of Grounds for Decision, the Court made points, which, the applicants contend, require amplification or fail to take into account *recent* decisions of the Supreme Court of the United States, namely:
>
> "'He cited no cases to support his contention that the Constitution of Maryland, as well as the Fourteenth Amendment to the Federal Constitution, guaranteeing equal rights to all citizens, has been violated by the application of a greater tax rate in his case than that which is applied to persons with lower incomes. The main thrust of his argument was based on a one man, one vote analogy for which he likewise cited no authority to show its applicability here.'
>
> While these statements are true, it should also be noted that this question has not been brought before any Maryland Court since the enactment of the Maryland graduated income tax.
>
> "The applicants submit that this is the first case to raise this question in the State of Maryland and further submit that lack of 'authority' and previous cases should not prejudice the court in determining whether or not a person's constitutional rights have been violated.
>
> "'The validity of the graduated income tax scale has been judicially determined many times and has been upheld both on the Federal and State levels.' While this statement is true, it should also be noted that the question has not been reconsidered in light of the principles put forth by the Supreme Court of the United States in its decision re-apportioning state legislatures. These principles are that states must treat all citizens equally (one man, one vote) and that denial of equality by the Federal Constitution is limited to Federal jurisdiction and is not transfer-

> able by analogy to the State Constitution (the Federal formula does not apply). Furthermore, the Supreme Court has further stated 'where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them.' This principle while set forth in the *Miranda* case, a criminal case, should be applicable in any citizen vs. state question."

In his opinion affirming the opinion of the Maryland Tax Court, Judge Parker chose not to address himself to the points raised in appellants' Petition. Instead, he offered other grounds for his opinion when he said "The one-man one-vote rule as proved by the Supreme Court was restricted to a vote at a public election and did not intend to set the standards for changing tax structures. The Supreme Court has long held that any reasonable standard adopted by the State to raise necessary revenues to perform its function of government is constitutional so long as it is reasonable within the due process of law."

As to the intent of the Supreme Court, the appellants can find no specific restriction in their rulings (*Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed 2d 663 and *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed 2d 506 which would limit the one man one vote principles to public elections. Indeed, what the Court seems to have been saying in a variety of recent decisions, both civil and criminal, is that every state must treat all its citizens in an equal fashion, the only limitation being "nearly as is practicable" in the determination of election districts.

In *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed 2d 694 86 S.Ct. 1602, the Court specifically said: "Where rights secured by the Constitution are involved, there can be no rule making or *legislation* which would abrogate them" (Emphasis supplied). The appellants claim that the Maryland income tax law of 1967 is legislation which abrogates a right secured by the Fourteenth Amendment, namely, equal protection of the law.

The question of "reasonableness" of a *graduated* income tax has not been brought before the Supreme Court since the one man-one vote rule was established.

The brief opinion of Judge Parker infers that he feels that a graduated income tax is a *reasonable* standard adopted by the State of Maryland to raise necessary revenues. The appellants claim that a graduated income tax is unreasonable in that it allows for a citizen with a taxable income of $2,000 to pay a tax of $50, while a citizen with 10 times that taxable income pays 18.8 times as much.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the opinions of Judge Parker be over-ruled, that the Order of the Maryland Tax Court be reversed, and that the Comptroller of the Treasury be ordered to pay the $439.00 refund claimed.

Respectfully submitted,

H. Thomas Foley and
Mary V. Foley

Pro se

APPENDIX

IN THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, MARYLAND

H. THOMAS FOLEY, and MARY V. FOLEY, His Wife, Plaintiffs	
vs	Law No. 41,585
COMPTROLLER OF THE TREASURY Defendant	

DOCKET ENTRIES

1969

September 2 – (1) Order for Appeal from Denial of Income Tax Refund Affirmation and Petition for Review of Adverse Decision Affirming Denial of Income Tax Refund, filed.

September 24 – (2) Transcript of Proceedings, filed.

September 24 – (3) Photostat copy of Order of Court, filed.

September 24th – (4) Photostat copy of Memorandum of Grounds for Decision, filed.

October 13 – (5) Answer, filed.

November 7 – (6) Case has been definitely set for a Non-Jury Trial for November 19, 1969, A copy of Notice filed.

November 19 – Hearing in open Court on Appeal from Maryland Tax Court. Judge Parker; Kimmel, reporter. The Opinion of the Maryland Tax Court is Affirmed. Appeal dismissed.

December 15 – (7) Notice of Appeal to the Court of Appeals of Maryland, filed.

1970

January 6 – (8) Motion to Extend Time for Transmitting Record, filed.

January 8 – (8a) Order of Court, thereon extending time within which to transmit record, (Judge James H. Taylor), filed.

March 10 – Transcript of Proceedings, filed.

IN THE
MARYLAND TAX COURT

H. Thomas & Mary V. Foley

vs. Income Tax No. 156

Comptroller of the Treasury

ORDER OF COURT

The above entitled case having on for hearing, testimony having been taken and the matter considered, it is this 8th day of August, 1969, by the Maryland Tax Court ORDERED that the action of the Comptroller denying the petitioners' claim for a refund be and the same is hereby AFFIRMED.

Certified True Copy
Test: Edwin W. Lowe, Clerk

cc: H. Thomas Foley
J. Nelson Rickards, Jr.
Jon F. Oster

MEMORANDUM OF GROUNDS FOR DECISION

The petitioner presented no evidence in support of his claim for a refund based on an amended return filed by himself and his wife in 1968 for the tax year 1967. He cited no cases to support his contention that the Constitution of Maryland, as well as the Fourteenth Amendment to the Federal Constitution, guaranteeing equal rights to all citizens, has been violated by the application of a greater tax rate in his case than that which is applied to persons

with lower incomes. The main thrust of his argument was based on a one-man, one-vote analogy, for which he likewise cited no authority to show its applicability here. A number of cases have been decided confirming the right of the State, through its legislative arm, to make reasonable classifications with regard to the incidence of the income tax. The validity of the graduated income tax scale has been judicially determined many times and has been upheld both on the Federal and State levels.

Art. 81, § 6 classifies income taxes with other excise taxes. In the case of *Oursler v. Tawes*, 178 Md. 471 (1940), the Court of Appeals said: "Taxes laid with a political view are not 'property taxes' but are such taxes as the legislature may levy, not upon property but upon occupations, privileges, contracts and things of that nature, *and as to those the rule of equality is not applicable*". [Italics supplied]. This case also held that the Federal Constitution, with respect to equal protection, did not prevent States from adjusting their systems of taxation in all proper and reasonable ways, provided all person in like circumstances who are affected in the same manner are treated under the law in the same way. The case specifically held the Maryland income tax law to be constitutional; see also *Diefendorf v. Gallet*, 10 P. (2d) 307 (Idaho, 1932).

In light of the above cited cases and the lack of affirmative evidence from the taxpayer, this Court denies the claim for a refund; [Art. 81, § 229 (h)].

PETITION FOR REVIEW OF ADVERSE DECISION AFFIRMING DENIAL OF INCOME TAX REFUND
(Law No. 41,585)

H. Thomas Foley and Mary V. Foley, his wife, hereby petition this honorable court to review and reverse the decision of the Maryland Tax Court with respect to the August 8, 1969 Order of the Court, said order affirming the Comp-

troller's denial of applicant's claim for refund of income tax for the tax year 1967 (Income Tax No. 156), and for reasons state:

1. The applicants, on August 9, 1968, submitted an amended income tax return for the tax year 1967 claiming a partial refund of taxes paid on the incomes of the applicants. The amount claimed is $439.00. The basis of the claim was then and is now as follows:

Article 2 of the Constitution of the State of Maryland states: "The Constitution of the United States and the Laws made, or which shall be made in pursuance thereof, and all Treaties made, or which shall be made under the authority of the United States, are and shall be the Supreme Law of the State; and the judges of this state, and all the people of this State, are, and shall be bound thereby; anything in the Constitution or Law of this State to the contrary notwithstanding."

Amendment XIV Section 1 of the Constitution of the United States says that no state may "deny any person within its jurisdiction the equal protection of the law.

We claim that a tax of $510 on the taxable income of H. Thomas Foley represents a rate of about 5% and that a tax of $307 on the taxable income of Mary V. Foley represents a rate of about 4.7%.

We claim, therefore, that this represents denial of equal protection of the law in that the rate for persons with the low-taxable income is lower; i.e. 2%.

Therefore we claim that all monies over and above 2% of the taxable income are collected unconstitutionally.

To sum up: one man; one vote; one tax rate.

2. On October 16, 1968 the Comptroller of the Treasury through the office of Benjamin F. Marsh, Income Tax Division denied the claim.

3. On October 28, 1968 a Petition of Appeal was filed with the Maryland Tax Court in Baltimore. (Income Tax No. 156)

4. On July 23, 1969 a hearing was held on the appeal.

5. On August 8, 1969 an Order of Court in the Maryland Tax Court affirmed the action of the Comptroller denying the petitioners' claim for a refund.

6. In its Memorandum of Grounds for Decision, the court made points which, the applicants contend, require amplification or fail to take into account *recent* decisions of the Supreme Court of the United States namely:

a. "He cited no cases to support his contention that the Constitution of Maryland, as well as the Fourteenth Amendment to the Federal Constitution, guaranteeing equal rights to all citizens, has been violated by the application of a greater tax rate in his case than that which is applied to persons with lower incomes. The main thrust of his argument was based on a one man, one vote analogy for which he likewise cited no authority to show its applicability here."

While these statements are true, it should also be noted that this question has not been brought before any Maryland Court since the enactment of the Maryland graduated income tax.

The applicants submit that this is the first case to raise this question in the State of Maryland and further submit that lack of "authority" and previous cases should not prejudice the court in determining whether or not a person's Constitutional rights have been violated.

b. "The validity of the graduated income tax scale has been judicially determined many times and has been upheld both on the Federal and State levels." While this statement is true, it should also be noted that the question has not been reconsidered in light of the principles put forth by the Supreme Court of the United States in its decision reapportioning state legislatures. These principles are that states must

treat all citizens equally (one man, one vote) and that denial of equality by the Federal Constitution is limited to Federal jurisdiction and is not transferable by analogy to the State Constitution (the Federal formula does not apply). Furthermore, the Supreme Court has further stated "where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them." This principle while set forth in the *Miranda* case, a criminal case, should be applicable in any citizen vs. state question.

7. The applicants contend that in view of these recent decisions of the Supreme Court, the cases of *Oursler v. Tawes*, 178 Md. 471 (1940) and *Diefendorf v. Gallet*, P. (2nd) 307 (Idaho, 1932) are not grounds for the Maryland Tax Courts Affirmation of the Comptrollers action.

Wherefore, applicants H. Thomas Foley and Mary V. Foley pray that the decision of the Maryland Tax Court affirming the Comptroller's action denying the petitioners' claim be reversed and that this Court order the Comptroller to refund the amount claimed.

Respectfully submitted,

/s/ H. Thomas Foley

/s/ Mary V. Foley

2309 Belleview Avenue
Cheverly, Maryland 20785

[Certificate of service omitted in printing]

ANSWER

The Appellee, Comptroller of the Treasury, Income Tax Division, by its attorneys, Francis B. Burch, Attorney General, and Jon F. Oster, Assistant Attorney General, for answer to

the appeal from the final order of the Maryland Tax Court filed herein by the Appellants, says:

The allegations contained in the Petition of appeal are denied.

WHEREFORE, the Appellee prays that the assessment appealed from be affirmed.

/s/ Francis B. Burch
Attorney General

/s/ Jon F. Oster
Assistant Attorney General

Attorneys for Appellee

[Certificate of service omitted in printing]

TRANSCRIPT OF PROCEEDINGS

Upper Marlboro, Maryland
November 19, 1969

THE DEPUTY CLERK: Law No. 41,585, H. Thomas Foley and Mary V. Foley, his wife, v. Comptroller of the Treasury.

THE COURT: Very well, sir, you are the moving party. What do you have to say?

MR. FOLEY: First, I would like to correct several errors that appear in the official transcript.

THE COURT: I am afraid I cannot correct any of those. I wasn't there.

MR. FOLEY: These are errors of typing, et cetera, which I am sure Mr. Oster might wish to agree to. It makes things read with sense rather than no sense at all.

THE COURT: What page?

MR. FOLEY: Page 4, Line 15. After the word "is" it should be entered the words "in part."

THE COURT: "The statement that accompanied our return is in part as follows"? Is that correct?

MR. OSTER: I have no objection, your Honor.

MR. FOLEY: Page 5, Line 12. After the word "above" the words "two per cent of."

Line 16 of the same page the word is "redistricting" rather than "districting."

On Page 6, Line 3. The word after "enumeration" is "or" rather than "of."

THE COURT: What line are you?

[3] MR. FOLEY: Line 3, sir.

THE COURT: It is "or" rather than "of." On page 7, Line 21, the name of the case cited is Oursler v. Tawes. The stenographer inserted counsel's name by mistake.

THE COURT: Very well. You are appealing this. It is incumbent upon you to show what is wrong with what has been done before.

MR. FOLEY: Yes, sir. I would like to review the history of the case that comes before the Court. We filed on August 9, 1968, an amended income tax return for the taxable year 1967 claiming a partial refund of taxes paid on the income of the applicants. The amount claimed was $439.00. The baiss of the claim was then and is now as follows:

"Article 2 of the Constitution of the State of Maryland states: 'The Constitution of the United States and the laws made, or which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, are and shall be the Supreme Law of the State; and the judges of this state, and all the people of this State, are and shall be bound thereby; anything in the Constitution or Law of this State to the contrary notwithstanding.'"

Amendment Fourteen, Section 1 of the Constitution of the United States, ". . . nor deny any person within its [4] jurisidction the equal protection of the law."

We claim that a tax of $510 on the taxable income of H. Thomas Foley represents a rate of about five percent and that a tax of $307 on the taxable income of Mary V. Foley represents a rate of about 4.7 per cent. We claim,

therefore, that this represents denial of equal protection of the law in that the rate for persons with the low taxable income are taxes a lower percentage, that is, two per cent. Therefore, we claim that all monies over and above two per cent of the–

THE COURT: Who is that that pays two per cent?

MR. FOLEY: Other persons. That is their basic rate for taxable income of $2,000 or less.

THE COURT: What do you make?

MR. FOLEY: Are you interested in taxable income or gross?

THE COURT: What they tax.

MR. FOLEY: Taxable income that year was $10,000.

THE COURT: You say that averaged out to four per cent?

MR. FOLEY: Five per cent.

THE COURT: Your contention is that that is a violation of the Constitution because they charge people with incomes of less than $2,000 at the rate of two per cent?

MR. FOLEY: That is right.

THE COURT: That is your argument?

[5] MR. FOLEY: Yes, sir.

THE COURT: Is that your case?

MR. FOLEY: Yes, sir.

THE COURT: Is it the same standard? Does it collect two per cent from everybody?

MR. FOLEY: Your Honor, the case is based on the idea that in a relation between the person and the State the State may do the same to all persons.

THE COURT: In that class.

MR. FOLEY: That is what I am trying to bring before the Court. That is, whether this is reasonable classification.

THE COURT: Can you show me where they have discriminated against you with anybody in your same class? In other words, if you and I make $10,000, are they charging me less than they are charging you?

MR. FOLEY: The income taxes are taxed on a yearly basis and the rates are set so that the–the rate should be the same for all persons.

THE COURT: You mean even though a person only makes $2,000?

MR. FOLEY: I don't mind them taxing me at two per cent if they tax him two per cent. I have no objection to that at all.

To increase my tax by taxing at a higher income and to tax it at higher rate would thereby double your jeopardy.

[6] THE COURT: Double your what?

MR. FOLEY: Doubit the tax, in effect, because—in other words, I am put in jeopardy because of the two per cent, plus an additional surtax for making $10,000.

THE COURT: You still pay the same tax though that everybody else in that same class pays, do you not?

MR. FOLEY: Which class is that?

THE COURT: The $10,000 class.

MR. FOLEY: Everybody is classified different because everybody's income is different. Your tax is not based on a very narrowly defined class. This means there is a diffusion of classes. Your class varies from time to time. My claim is that the State should tax individuals without looking in regard to their total income. With property taxes no matter who owns the house the tax is the same. I am trying to make an analogy of income taxes to sales taxes or property taxes, which would be the same for all people.

THE COURT: This doesn't involve any tax on real property.

MR. FOLEY: I hope my income is real property.

THE COURT: Your income?

MR. FOLEY: If I get an income I have money. That is property.

THE COURT: That is personal property.

MR. FOLEY: Personal property, I assume, is taxed [7] at the same rate for all persons.

THE COURT: What I am trying to get from you—I haven't been successful so far—is that I think you agree with me that a man that makes $2,000 is taxed at two per cent.

MR. FOLEY: Yes, sir.

THE COURT: A man that makes $10,000 is taxed at four or five per cent.

MR. FOLEY: Yes, sir.

THE COURT: You say that is unconstitutional per se?

MR. FOLEY: Yes, sir.

THE COURT: Even though it applies to all classes of those people within the income bracket of $2,000 and $10,000?

MR. FOLEY: Yes, sir.

THE COURT: Is that your case?

MR. FOLEY: Yes, sir.

THE COURT: Do you want to be heard on that?

MR. OSTER: Your Honor, I think that everybody would be happier—including you and I—if we could establish a constitutional principle that any man making an income, irrespective of what that income is, would be taxed at the same rate. What the taxpayer here is contesting is the fact that we have established a graduated rate in Maryland. That is his real objection.

THE COURT: I understand that.

[8] MR. OSTER: There just simply is no case that I know or or can find and the taxpayer has cited no case.

MR. FOLEY: May I continue with the brief or the appeal review that I filed?

THE COURT: I read it before I came in here.

MR. FOLEY: I would like to refer you to Item 6, where the opinion of the Tax Court stated, "He cited no cases to support his contention that the Constitution of Maryland, as well as the Fourteenth Amendment to the Federal Constitution, guaranteeing equal rights to all citizens, has been violated by the application of a greater tax rate in his case than that which is applied to persons with lower incomes. The main thrust of his argument was based on a one man, one vote analogy for which he likewise cited no authority to show its applicability here."

While these statements are true it should be noted that this question has not been brought before any Maryland court since the enactment of the Maryland graduated income tax. The applicants submit this is the first case to raise

this question in the State of Maryland and further submit the lack of "authority" and previous cases should not prejudice the court in determining whether or not a person's constitutional rights have been violated.

THE COURT: Is there any further argument?

MR. FOLEY: Just to say further that another point [9] I raised in the case is the fact that the cases cited by the Maryland Tax Court are very old cases and do not reflect the views of the Supreme Court in the one man, one vote cases and all citizens before the State must be treated in an equal fashion. That was covered in Point 6(b) and 7 of my review.

THE COURT: Very well, gentlemen, the matter comes before the Court on an appeal from the Maryland Tax Court by way of H. Thomas and Mary V. Foley with an amended tax return which they filed in the State of Maryland August 9, 1968 in the amount of $439.00. The thrust of the appellants' contention is that he and his wife are being discriminated against, as the Court understands it, in that he is being taxed on a higher rate than a person earning considerably lower than his rate of income. What he, in effect, is doing is contesting the graduated tax rate as established by the State of Maryland, and he says that it is unconstitutional inasmuch as it is discriminating against those in a class that earn greater sums than other classes that make lesser sums. We are bound to agree with the Maryland Tax Court where they say that it is reasonable for the State of Maryland through its legislative arm to make reasonable classification with regard to the instance of income tax. Obviously a man making $2,000 is a man in distress regardless of what rate you charged him.

MR. FOLEY: That would be on taxable income rather—

THE COURT: If you don't mind, I would like to finish [10] my opinion.

We consider that the man earning $2,000 should be taxed at a lower rate than a man making $10,000. We might observe that those in the bracket of fifty to one hundred

thousand dollars pay a great deal higher rate than you do. That, of course, is not desirable, but I know of no substitute and I know of nothing in the Maryland Constitution or the Declaration of Rights or in the Federal Constitution that prohibits it. The one man-one vote rule as proved by the Supreme Court was restricted to a vote at public election and did not intend to set the standards for changing tax structures. The Supreme Court has lone held that any reasonable standard adopted by the State to raise necessary revenues to perform its function of government is constitutional so long as it is reasonable within the due process of law. For that reason the Court affirms the opinion of the Maryland Tax Court and dismisses the appeal.

(Whereupon, proceedings in the above-entitled matter were concluded.)

* * *

APPENDIX B
IN THE

Court of Appeals of Maryland

SEPTEMBER TERM, 1970

No. 30

H. THOMAS FOLEY AND MARY V. FOLEY,
Appellants,

v.

COMPTROLLER OF THE TREASURY,
Appellee.

APPEAL FROM THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY (ROSCOE H. PARKER, Judge)

BRIEF OF APPELLEE

STATEMENT OF THE CASE

Appellee accepts Appellants' Statement of the Case.

QUESTION PRESENTED

Does the progressive rate of the Maryland income tax violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States?

STATEMENT OF FACTS

Appellee accepts Appellants' Statement of Facts.

ARGUMENT

THE PROGRESSIVE RATE OF THE MARYLAND INCOME TAX AS IT APPLIES TO THE APPELLANTS DOES NOT IMPOSE UPON THEM A SUBSTANTIAL TAX BURDEN THAT IS BASED UPON DISCRIMINATION WHICH IS ARBITRARY AND CAPRICIOUS SO AS TO CONSTITUTE A VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Article 81, Section 288(a) of the Annotated Code of Maryland (1969 Replacement Volume) imposes a progressive rate of tax on the taxable net income of individuals as follows:

> "There is hereby levied and imposed for each calendar year beginning after December 31, 1966, a tax on the taxable net income, as defined in § 280 (a) of every resident individual of this State and on the taxable net income, taxable in this State, of every individual not a resident of this State. Such tax shall be at the following rates: two percent (2) on the first $1,000.00 of taxable income, three percent (3%) on the second $1,000.00 of taxable income, four percent (4%) on the third $1,000.00 of taxable income, and five percent (5%) of all taxable income in excess of $3,000.00."

The Appellants contend that this graduation of rates from two percent (2%) to five percent (5%) constitutes unequal treatment and violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. As grounds for this contention the Appellants cite the cases of *Baker v. Carr*, 369 U.S. 186 (1962), and *Reynolds v. Sims*, 377 U.S. 533 (1964).

The Appellee has not found any recent cases attacking the progressive rate feature of a State income tax. The progressive rate feature of the federal War Revenue Act of June 1898 was attacked on grounds of fundamental principles of equality and justice in *Knowlton v. Moore*, 178

U.S. 41 (1900). In rejecting the attack, Mr. Justice White said for the Supreme Court:

> "The review which we have made exhibits the fact that taxes imposed with reference to the ability of the person upon whom the burden is placed to bear the same have been levied from the foundation of the government. So, also, some authoritative thinkers, and a number of economic writers, contend that a progressive tax is more just and equal than a proportional one. In the absence of constitutional limitation, the question whether it is or is not is legislative, and not judicial. The grave consequences which it is asserted must arise in the future if the right to levy a progressive tax be recognized involves in its ultimate aspect the mere assertion that free and representative government is a failure, and that the grossest abuses of power are foreshadowed unless the courts usurp a purely legislative function. If a case should ever arise, where an arbitrary and confiscatory exaction is imposed bearing the guise of a progressive or any other form of tax, it will be time enough to consider whether the judicial power can afford a remedy by applying inherent and fundamental principles for the protection of the individual, even though there be no express authority in the Constitution to do so. That the law which we have construed affords no ground for the contention that the tax imposed is arbitrary and confiscatory is obvious." *supra*, pp. 109-110.

In *Breshaber v. Union P. R. Co.*, 240 U.S. 1 (1916) the progressive feature of the federal income tax provisions of the Tariff Act of October 3, 1913 was attacked as an arbitrary abuse of power wanting in due process. In upholding the progressive feature Mr. Justice White stated the attack disregarded "the fact that in the very early history of the government a progressive tax was imposed by Congress, and that such authority was exerted in some, if not all, of the various income taxes enacted prior to 1894 . . ." *supra*, p. 25.

Baker v. Carr, supra, involved an action under the Civil Rights Act brought by certain Tennessee Appellants who alleged that the apportionment of the State legislature deprived them of a federal constitutional right to equal protection of the law. A United States District Court was asked for a declaratory judgment invalidating the 1901 statute on which the apportionment was based. The Appellants' argument was that although the Tennessee Constitution provided for a decennial apportionment of representatives and senators among the counties and districts according to their respective numbers, the legislature had failed to make such reapportionment since 1901. Because of population changes in the past sixty years the Appellants argued that their votes had been unconstitutionally debased on the grounds that the Equal Protection Clause forbids arbitrary and unreasonable apportionment of legislative seats. The Supreme Court held that the federal courts had jurisdiction of the subject matter and that the debasement of a citizen's vote because of malapportionment of a State legislature presented a justiciable controversy under the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court also determined that the Equal Protection Clause provides manageable standards by which lower courts could decide upon the constitutionality of a State apportionment plan. No constitutional standard, however, was set forth in the decision.

Approximately two years later, in *Reynolds v. Sims*, 377 U.S. 533 (1964), and five companion cases decided the same day one of which was *Maryland Comm. for Fair Representation v. Tawes*, 377 U.S. 695 (1964), 228 Md. 412, the Supreme Court held that the application of the Equal Protection Clause to State legislative districting required that representation in both chambers of a State legislature be apportioned by population.

The Appellants in the instant case argue that the apportionment by population principle which they characterize as "one man — one vote principles to public elections", by analogy affects a scheme of income taxation which uses progressive rates and that the use of such progressive rates violates the Equal Protection Clause of the Fourteenth Amendment.

Baker v. Carr, supra and *Reynolds v. Sims, supra*, have been frequently cited, however, the principles enumerated therein by the Supreme Court have been strictly construed and for the most part their application has been limited to legislative reapportionment problems. Litigants have been unsuccessful when they attempted to apply the principles relating to legislative apportionment to other areas of law. Thus, in *Young v. State*, 220 So. 2d 843 (Ala. 1969), the Supreme Court of Alabama, in a second degree murder case, refused to draw an analogy between an Alabama law which permitted a jury to separate and the situation involving the denial of equal franchise in *Baker v. Carr, supra*, and *Reynolds v. Sims, supra*; in *Schweitzer v. Clerk for City of Plymouth*, 164 N.W. 2d 35 (Mich. 1969), the decisions of *Baker v. Carr, supra*, and *Reynolds v. Sims, supra*, were rejected by the Supreme Court of Michigan as support for the argument that the equal protection clause was violated by a city charter provision requiring property ownership to qualify for public office; and in *Cox v. Katz*, 294 N.Y. Supp. 2d 544 (1968), the Court of Appeals of New York held that "the one man — one vote" principle was not applicable to and did not invalidate statutes providing for allocation and election of judges of a City-wide Civil Court of the City of New York, because the principle was not intended to regulate the election of judges whose functions are solely judicial.

In the famous case of *Welch v. Henry*, 305 U.S. 134 (1938) involving a broad attack on the income tax law of the State of Wisconsin which included a retroactive graduated tax on corporate dividends, Justice Stone stated for the Supreme Court at page 145 that:

> "it is a commonplace that the equal protection clause does not require a state to maintain rigid rules of equal taxation, to resort to close distinctions, or to maintain a precise scientific uniformity. Possible differences in tax burdens, not shown to be substantial, or which are based on discrimination not shown to be arbitrary or capricious, do not fall within the constitutional prohibition."

CONCLUSION

It is respectfully submitted that the statement quoted above by the Supreme Court in *Welch v. Henry, supra*, remains the standard by which a State income tax should be measured against the Equal Protection Clause. The Appellants have failed to show that their tax burden is substantial nor that it is based upon a discrimination which is arbitrary or capricious and, therefore, the Appellee requests that the judgment of the Circuit Court for Prince George's County be affirmed.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General,
JON F. OSTER,
Assistant Attorney General,
For Appellee.

APPENDIX C

IN THE COURT OF APPEALS OF MARYLAND

No. 30

SEPTEMBER TERM, 1970

H. THOMAS FOLEY and
MARY V. FOLEY

v.

COMPTROLLER OF THE TREASURY

Hammond, C.J.
Barnes
McWilliams
Finan
Singley
Smith
Digges,

JJ.

Opinion by Finan, J.

Filed: October 20, 1970

The appellants, as income taxpayers for the year 1967, claim a partial refund from the appellee (Comptroller of the Treasury) for taxes paid, on the premise that the progressive rate of the Maryland income tax provided by Code (1969 Repl. Vol.), Art. 81, § 288(a), violates the equal protection clause of the Fourteenth Amendment of the Constitution of the United States. The lower court affirmed the holding of the Maryland Tax Court which had found no merit to the appellants' challenge. This Court, likewise, finding no validity to the appellants' contentions affirms the lower court.

The appellants advance the novel theory that by analogy the "one man—one vote" doctrine, promulgated by the United States Supreme Court in the state legislature reapportionment cases of *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691 (1962), and *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362 (1964), should be extended to embrace not only the principle of "one man—one vote," but also one tax rate.

The Statute in question provides:

> "There is hereby levied and imposed for each calendar year beginning after December 31, 1966, a tax on the taxable net income, as defined in § 280(a) of every resident individual of this State and on the taxable net income, taxable in this State, of every individual not a resident of this State. Such tax shall be at the following rates: two percent (2%) on the first $1,000.00 of taxable income, three percent (3%) on the second $1,000.00 of taxable income, four percent (4%) on the third $1,000.00 of taxable income, and five percent (5%) of all taxable income in excess of $3,000.00" Maryland Code (1969 Repl. Vol.), Art. 81, § 288(a).

The graduation of rates from two percent (2%) to five (5%) is the alleged inequity about which the appellants complain, stating: "This variation in tax rate in of itself represents an inequality in that each taxpayer is not taxed in a similar manner. ***."

The appellants also emphasize that this is the first time that this issue has been presented to this Court and that the precedents upon which the State relies are all decisions prior to the "one man—one vote" decision of *Baker v. Carr, supra*. We might be disturbed by this argument if we thought there was much dispute over the validity of a graduated income tax when measured against the Fourteenth Amendment, or that *Baker v. Carr* presented any true analogy. Actually, the constitutionality of a graduated income tax, insofar as the Fourteenth Amendment is concerned, is now universally accepted as hornbook law and we fail to

find where the principle of *Baker v. Carr* has any application to the instant case under any rationale.

The validity of a progressive or graduated income tax, measured against the equal protection clause of the Fourteenth Amendment, was challenged and upheld as early as 1900 in the case of *Knowlton v. Moore*, 178 U.S. 41, 20 S.Ct. 747 (1900), in which the War Revenue Act of June 1898 was the subject of attack. In upholding the Act, Mr. Justice White said for the Supreme Court:

> "The review which we have made exhibits the fact that taxes imposed with reference to the ability of the person upon whom the burden is placed to bear the same have been levied from the foundation of the government. So, also, some authoritative thinkers, and a number of economic writers, contend that a progressive tax is more just and equal than a proportional one. In the absence of constitutional limitation, the question whether it is or is not is legislative and not judicial. The grave consequences which it is asserted must arise in the future if the right to levy a progressive tax be recognized involves in its ultimate aspect the mere assertion that free and representative government is a failure, and that the grossest abuses of power are foreshadowed unless the courts usurp a purely legislative function. If a case should ever arise, where an arbitrary and confiscatory exaction is imposed bearing the guise of a progressive or any other form of tax, it will be time enough to consider whether the judicial power can afford a remedy by applying inherent and fundamental principles for the protection of the individual, even though there be no express authority in the Constitution to do so. That the law which we have construed affords no ground for the contention that the tax imposed is arbitrary and confiscatory, is obvious." 178 U.S. at 109-110.

In the case of *Oursler v. Tawes*, 178 Md. 471, 13 A.2d 763 (1940), this Court had before it the question of the validity of certain aspects of the Maryland Income Tax Law

of 1939, Ch. 277, § 12 of the Acts of 1939. There was no issue regarding a graduated income tax, as there was none at that time; however, several other challenges to the constitutionality of the law were made. One involved the difference in the net income tax on resident individuals of this State and on the net income taxable in this State of individual non-residents. There were also issues concerning whether the Act required a taxpayer having an investment income to actually pay a tax in part on gross income. The issues in that case are not of moment now, but what is pertinent is the following language of this Court regarding the right of the Legislature to establish reasonable classifications for the purpose of taxation:

> "To whatever classification the species of income tax may belong, it is controlled by the basic principles which govern either excise or property taxation. The first of these is that, independently of constitutional provisions, and subject only to the limitations placed upon it by the Federal Constitution, the power of taxation is inherent in a sovereign state, because the right to tax underlies its own Constitution, and is not granted by it. Stated differently, the right may be regulated and limited by constitutional mandates, but it exists without express authority in the fundamental law as a necessary attribute of sovereignty.
>
> * * *
>
> "First of all, it may be observed that the Federal Constitution has not undertaken to lay down any hard and fast rule with respect to due process of law, the equal protection of the laws, or as to privileges and immunities; and as tersely summarized in *Board of Commnrs. etc. v. Johnson County*, 173 Ind. 76, 89 N.E. 590, 593; '***Nor does the equal protection clause prevent the states from adjusting their systems of taxation in all proper and reasonable ways. *** If all persons who are in like circumstances, or affected alike, are treated under the laws the same, there is no deprivation of equal protection

> of the law. *** The classification itself must be based upon natural reasons, upon reasons which naturally inhere in the subject matter, upon real difference existing between the classes, and so as to produce no distinction between members of the same class.' " at 482-483

A case containing language of similar import to that found in *Oursler* is *Blaustein v. Tax Commn.*, 176 Md. 423, 428, 4 A.2d 861 (1939), wherein the United States Supreme Court opinion in *Royster Guano Co. v. Virginia*, 253 U.S. 412, 40 S.Ct. 560 (1920), is quoted at length, as authority for the proposition that the Fourteenth Amendment does not prevent the states from resorting to reasonable classification for the purpose of taxation. See also *Breshaber v. Union P. R. Co.*, 240 U.S. 1, 36 S.Ct. 236 (1916).

A case giving strong support to the validity of a progressive income tax enacted by a state is that of *Welch v. Henry*, 305 U.S. 134, 59 S.Ct. 121 (1938). At issue was the constitutionality of the income tax law of the State of Wisconsin, which included a retroactive graduated tax on corporate dividends. The United States Supreme Court speaking through Mr. Justice Stone stated:

> "* * * It is a commonplace that the equal protection clause does not require a State to maintain rigid rules of equal taxation, to resort to close distinctions, or to maintain a precise scientific uniformity. Possible differences in tax burdens, not shown to be substantial, or which are based on discrimination not shown to be arbitrary or capricious, do not fall within the constitutional prohibition." 305 U.S. 134 at 145.

Interesting treaties which shed further light on the "Equal Protection Limits Upon Taxation" are *Commentaries on the Constitution of the United States*, by Chester James Antieau (Dennis & Co. Inc. Buffalo, N.Y. 1960), beginning at p. 107 and *Constitutional Uniformity and Equality in State Taxation*, by Wade J. Newhouse, Jr. (Michigan Legal Studies 1959), University of Michigan, Ann Arbor, begin-

ning at p. 606. In this latter work the author cites numerous cases in note 22 p. 607 in support of the constitutionality of a graduated income tax, including *Shaffer v. Carter*, 252 U.S. 37, 40 S.Ct. 221 (1920), and *Magoun v. Ill. Trust & Savings Bank*, 170 U.S. 283, 18 S.Ct. 594 (1898).

The gist of the reasoning of the cases and authorities is that the imposition of a graduated income tax does not *per se* constitute arbitrary or discriminatory classification of taxpayers. In fact, as was stated by the Court in *Knowlton*, "* * * a number of economic writers, contend that a progressive tax is more just and equal than a proportional one. * * *." The question of the means of taxation to be employed is a legislative function and, as long as that means is not discriminatory or arbitrary in its classifications of taxpayers, the courts may not reject it.

We conclude that the legality of a graduated or progressive income tax, such as we have in this State, insofar as the equal protection clause of the Fourteenth Amendment of the United States Constitution is concerned, *requiescit in pace* and should not be disturbed.

JUDGMENT AFFIRMED, APPELLANTS TO PAY COSTS.

APPENDIX D

U.S. Constitution, Amendment XIV

"Section 1 . . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX E

Annotated Code of Maryland (1969 Repl. Vol.): Article 81, Section 288(a)

"There is hereby levied and imposed for each calendar year beginning after December 31, 1966, a tax on the taxable net income, as defined in § 280 (a) of every resident individual of this State and on the taxable net income, taxable in this State, of every individual not a resident of this State. Such tax shall be at the following rates: two percent (2) on the first $1,000.00 of taxable income, three percent (3%) on the second $1,000.00 of taxable income, four percent (4%) on the third $1,000.00 of taxable income, and five percent (5%) of all taxable income in excess of $3,000.00."

In The

Supreme Court of the United States

October Term, 1970

No. 1244

H. THOMAS FOLEY AND MARY V. FOLEY,
Petitioners,

v.

COMPTROLLER OF THE TREASURY,
STATE OF MARYLAND,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Maryland

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1244

H. THOMAS FOLEY AND MARY V. FOLEY,

Petitioners,

v.

COMPTROLLER OF THE TREASURY,
STATE OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENT IN OPPOSITION

Petitioners have accurately set forth the opinions below, the grounds upon which the jurisdiction of this Court is invoked, the question presented for review, the constitutional provision and statute involved and the statement of the case.

REASON FOR DENYING THE WRIT

THE PROGRESSIVE NATURE OF THE MARYLAND INCOME TAX AS APPLIED TO PETITIONERS DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Petitioners contend that Article 81, Section 288(a) of the Annotated Code of Maryland (1969 Replacement Volume) which imposes a progressive rate of tax varying from two percent (2%) to five percent (5%) on the taxable net income of individuals constitutes unequal treatment and violates the Equal Protection Clause. As basis for this contention the Petitioners cite the cases of *Baker v. Carr*, 369 U.S. 186 (1962), and *Reynolds v. Sims*, 377 U.S. 533 (1964).

The doctrine of "one man — one vote" as formulated by this Court in the state legislature reapportionment cases of *Baker v. Carr*, *supra*, and *Reynolds v. Sims*, *supra*, simply does not support Petitioners' contention that the principle of "one man — one vote" commands, by analogy, one tax rate.

The validity of a progressive or graduated income tax has long been established as being non-violative of the Equal Protection Clause. As early as 1900, this Court in *Knoulton v. Moore*, 178 U.S. 41 (1900) upheld the progressive rate feature of the Federal War Revenue Act of June 1898 which was attached on grounds of fundamental principles of equity and justice. Mr. Justice White said for the Court:

> "The review which we have made exhibits the fact that taxes imposed with reference to the ability of the person upon whom the burden is placed to bear the same have been levied from the foundation of the government. So, also, some authoritative thinkers, and a number of economic writers, contend that a progressive tax is more just and equal than a proportional one. In the absence of constitutional limitation, the question

whether it is or is not is legislative, and not judicial. The grave consequences which it is asserted must arise in the future if the right to levy a progressive tax be recognized involves in its ultimate aspect the mere assertion that free and representative government is a failure, and that the grossest abuses of power are foreshadowed unless the courts usurp a purely legislative function. If a case should ever arise, where an arbitrary and confiscatory exaction is imposed bearing the guise of a progressive or any other form of tax, it will be time enough to consider whether the judicial power can afford a remedy by applying inherent and fundamental principles for the protection of the individual, even though there be no express authority in the Constitution to do so. That the law which we have construed affords no ground for the contention that the tax imposed is arbitrary and confiscatory is obvious" *supra*, pp. 109-110.

Likewise, in *Brushaber v. Union P.R. Co.*, 240 U.S. 1 (1916) the Court sustained the progressive feature of the federal income tax provisions of the Tariff Act of October 3, 1913 which was attacked as an arbitrary abuse of power wanting in due process.

In *Welch v. Henry*, 305 U.S. 134 (1938) the Court upheld the validity of an income tax enacted by the State of Wisconsin which included a retroactive graduated tax on corporate dividends. Justice Stone stated for the Supreme Court:

> "It is a commonplace that the equal protection clause does not require a state to maintain rigid rules of equal taxation, to resort to close distinctions, or to maintain a precise scientific uniformity. Possible differences in tax burdens, not shown to be substantial, or which are based on discrimination not shown to be arbitrary or capricious, do not fall within the constitutional prohibition." *supra*, p. 145.

Similar language as quoted above from *Welch v. Henry*, supra, can also be found in *Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920) at 415.

In view of the decisions cited above, Petitioners' contention that a progressive state income tax is *per se* unconstitutional under the Equal Protection Clause is without merit.

CONCLUSION

It is respectfully submitted that the statement quoted above by this Court in *Welch v. Henry*, supra, remains the standard by which a state income tax should be measured against the Equal Protection Clause. Petitioners have failed to show that their tax burden is substantial nor that it is based upon a discrimination which is arbitrary or capricious and, therefore, petition for writ of certiorari should be denied.

Respectfully submitted,

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